Supreme Court, U.S.
FILED
98 379 SEP 1 1998
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BENNIE THRASHER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

ERIC A. OESTERLE
Counsel of Record
ALAN M. POSNER
MARY L. MILLS
MONICA A. FENNELL
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Counsel for Petitioner

37 pp

QUESTION PRESENTED

Whether the exclusion of a uniquely credible defense witness's material exculpatory testimony at a criminal trial, for violation of a witness sequestration order, denied petitioner his due process and Sixth Amendment rights, where the witness's violation was without the fault of petitioner or defense counsel.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT OF CERTIORARI 8

A. The Court Should Speak To An Important And Recurrent Question Which It Has Not Addressed Since 1893 8

B. Exclusion Of A Defense Witness's Testimony At A Criminal Trial For Violation Of A Sequestration Order Contravenes The Sixth Amendment And The Due Process Clause, Where The Barred Testimony Was Material And The Witness's Violation Of The Order Was Unknown To The Defendant And Defense Counsel 9

TABLE OF CONTENTS – Continued

Page

C. Mr. Harris's Testimony Was Material And Not Cumulative, Because He Was Uniquely Credible As Compared With Petitioner And Derrick Thrasher, And There Is A Reasonable Likelihood That His Testimony Could Have Affected The Judgment Of The Trier Of Fact 14

CONCLUSION 18

APPENDIX

TABLE OF AUTHORITIES

Page

Cases:

Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972) 9, 12, 16

Chambers v. Mississippi, 410 U.S. 284 (1973) 10

Commonwealth v. Scott, 436 A.2d 161 (Pa. 1981) 9, 13

Davis v. State, 872 S.W.2d 743 (Tex. Crim. App. 1994) 16

Dumas v. State, 350 So. 2d 464 (Fla. 1977) 9, 13

Holder v. United States, 150 U.S. 91 (1893) 8, 13

People v. Johnson, 47 Ill. App. 3d 362, 362 N.E.2d 701 (5th Dist. 1977) 16

Skipper v. South Carolina, 476 U.S. 1 (1986) 14

State v. Jones, 354 So. 2d 530 (La. 1978) 9, 13

Taylor v. Illinois, 484 U.S. 400 (1988) 10

United States v. Hobbs, 31 F.3d 918 (9th Cir. 1994) 7, 9, 11, 12, 15, 16

United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) 9, 14, 17

Washington v. Texas, 388 U.S. 14 (1967) 9, 10, 12, 18

TABLE OF AUTHORITIES – Continued

Page

Provisions of the United States Constitution:

U.S. Const. Amend. VI ..... *passim*

U.S. Const. Amend. XIV, § 1 ..... *passim*

Statutes:

28 U.S.C. § 1257 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BENNIE THRASHER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

Bennie Thrasher prays that a writ of certiorari be granted to review the judgment of the Appellate Court of Illinois, First Judicial District, entered on March 6, 1998.

OPINIONS BELOW

The unreported Order of the Appellate Court of Illinois, First Judicial District, affirming the trial court's judgment and conviction, is reprinted in the Appendix ("A") hereto at A1-A6. The trial court's judgment and conviction is reprinted at A7-A8. An excerpt from the Report of Proceedings of the hearing before the trial court is reprinted at A9-A10. The order of the Illinois Supreme Court denying Petitioner's Petition for Leave to Appeal is reprinted at A11.

JURISDICTION

The judgment of the Appellate Court of Illinois, First Judicial District, was entered on March 6, 1998. The judgment of the Illinois Supreme Court denying the Petition for Leave to Appeal was entered on June 3, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

> process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. Amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioner Bennie Thrasher was convicted in a bench trial in the Circuit Court of Cook County, Illinois on two counts of controlled substance violations: one count of unlawfully and knowingly delivering less than ten grams of heroin to two men in a car, in violation of 720 ILCS 401(d); and one count of knowingly and unlawfully possessing with the intent to deliver 15 grams or more but less than 100 grams of heroin allegedly recovered by Chicago police officers in a bedroom, in violation of 720 ILCS 401(a)(1)(A). He was sentenced to 8 years in prison. (A1, A7.)

The issue raised by this Petition concerns the trial court's exclusion of the testimony of a defense witness, William Harris, because Mr. Harris violated the trial court's sequestration order excluding witnesses from the courtroom during trial. The violation was concededly without the knowledge of Petitioner or Petitioner's trial counsel. A synopsis of the trial is set forth here to show the context and materiality of Mr. Harris's excluded testimony.

Police Testimony. The State's case depended entirely on police testimony. Two Chicago police officers testified that they were conducting surveillance near a residence at 5452 West Ohio Street. They stated that they saw Petitioner exit the building and approach a car occupied by two men, who were identified as Derrick Thrasher, Petitioner's brother, and Marcus White. They testified that they saw Petitioner hand three plastic bags containing foil packets to White. (A1-A2.)

The police officers claimed that when their presence was observed, the driver threw the three bags out the window, and one of the police officers picked them up. The police officers stated that Petitioner then fled into the residence at 5452 West Ohio Street. It was undisputed that Petitioner's brother and two of his uncles lived at that address. Petitioner denied living there, but there was evidence to the contrary. (A3, A4.)

One of the police officers testified that he chased Petitioner up the stairs of the Ohio Street house and arrested Petitioner in a bedroom. The officer testified that in the bedroom, he found a shoe box containing tinfoil packets. The policeman said that in the bedroom, he also found beepers, cellular phones, a State of Illinois identification card bearing Petitioner's photograph and the Ohio Street address, and some photographs of Petitioner with other unidentified individuals. The police stated that testing showed the presence of heroin in packets in the bags retrieved from the street, and in the packets allegedly found in the box in the bedroom. (A2.)

The State presented no fingerprint evidence from any of the plastic bags, packets, beepers or cell phones they allegedly recovered, or from any of the rooms of the Ohio Street residence. In other words, the only evidence linking Petitioner to any of the contraband was police testimony, because there was no physical evidence at all that he had ever possessed or handled the contraband. With respect to the contraband

allegedly recovered in the bedroom, it is significant that there was no evidence to show which (if any) family member regularly occupied the room. There was also no evidence showing to whom the beepers or cell phones were registered.

Defense Testimony. Petitioner and Derrick Thrasher, his brother, were the only two defense witnesses who testified.

Petitioner testified that, contrary to the police testimony, Petitioner and Derrick Thrasher and Marcus White were *not* arrested at the Ohio Street building. Instead, Petitioner stated that they were arrested in a car blocks away. (A3.) Petitioner testified that the police officers took his keys and ID card out of his pocket and took Petitioner and his colleagues to the police station. (*Id.*) He testified that twenty to thirty minutes later, the police came back to the police station with a shoe box, and that Petitioner did not know what was in the box. (*Id.*)

Derrick Thrasher similarly testified that he, Petitioner and White were arrested in a car four or five blocks away from the Ohio Street residence. (A2.) He stated that the police did not find anything in the car and that he did not throw bags of drugs out the window. (A2-A3.) Derrick Thrasher was charged with possession of a controlled substance. He was found not guilty in a separate bench trial, preceding Petitioner's trial, heard by the same judge who tried Petitioner.

Excluded Testimony. The trial court excluded the testimony of defense witness William Harris, because Mr. Harris violated the court's order excluding the presence of witnesses during the trial. (A3.) It was undisputed that Mr. Harris, Petitioner's uncle, was on a couch in the living room at the time police entered the Ohio Street house. One of the police officers conceded having seen Mr. Harris on the couch when police entered the house. (A2, A3.)

During Petitioner's trial, Mr. Harris entered the courtroom — unnoticed by Petitioner or defense counsel. The trial judge expressly recognized on the record that defense counsel had instructed Mr. Harris "to get out and stay out" of the courtroom. (A10.) However, the trial judge barred Mr. Harris's testimony for violation of the sequestration order, even though the violation was not the fault of Petitioner or defense counsel:

> As I say at the beginning of the case, then you have to control your witnesses and exclude them. And *if you do that and they come back any way, it's charged to the defendant whether it is his fault or not.*
>
> I am not saying it's the defendant's fault. I am not saying it's your [defense counsel's] fault, but it is your witness' fault and he knew that.

(A10 (emphasis supplied).)

Defense counsel made the following offer of proof of Mr. Harris's testimony:

> He will testify that on the date and time in question the officers came to his house, by themselves, not with the defendant, not with any defendants, came in and searched the house using keys that they had which he believes were gotten from Derrick or Bennie Thrasher. * * * He will testify that the defendant did not run inside the house and was not even present when the police officers came inside and searched the house.

(A10.)

Judgment and Sentence. The trial judge found Petitioner guilty of controlled substance violations for delivering the packets to the car and for possessing with the intent to deliver the packets allegedly found in the bedroom. On May 21, 1996, Petitioner was sentenced to eight years in prison. (A7.)

Decision of The Illinois Appellate Court. The Illinois Appellate Court affirmed Petitioner's conviction. (A1-A6.) In the Appellate Court, Petitioner argued that the exclusion of Mr. Harris's testimony violated Petitioner's Sixth Amendment and due process rights. The Appellate Court ruled, without expressly addressing the Sixth Amendment or due process, that "Defendant was not deprived of material testimony from Harris, whose testimony would have been cumulative of Derrick Thrasher's and his own testimony." (A6.)

Presentation of Federal Question In The State Trial And Appellate Courts. In his post-trial motion for a new trial or for entry of a finding of not guilty, Petitioner raised, among other grounds, that he was "denied due process" and "did not receive a fair and impartial trial as guaranteed under the Fourteenth Amendment to the United States Constitution."[1]

In the Appellate Court, Petitioner's opening brief and reply brief specifically argued, with discussion of multiple authorities, that "the trial court improperly barred the testimony of William Harris, thereby violating defendant's due process,

---

[1] The State argued to the Appellate Court that, as a matter of Illinois procedure, the witness exclusion issue had not been preserved with sufficient specificity in the post-trial motion. Petitioner argued that the exclusion constituted "plain error," which could be reviewed on appeal regardless of the specificity of the post-trial motion. *See United States v. Hobbs,* 31 F.3d 918, 921 (9th Cir. 1994). The Appellate Court reviewed the exclusion of Mr. Harris's testimony without reference to the sufficiency of its preservation in the post-trial motion.

Sixth Amendment, and Illinois constitutional rights." This argument was also raised before the Illinois Supreme Court in the Petition for Leave to Appeal.

Denial Of Leave To Appeal. On June 3, 1998, the Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal. (A11.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. The Court Should Speak To An Important And Recurrent Question Which It Has Not Addressed Since 1893.

The Court last considered the proper remedy for a defense witness's violation of a sequestration order over a century ago. In *Holder v. United States,* 150 U.S. 91 (1893), without reference to the Sixth Amendment, the Court stated the following rule:

> If a witness disobeys the order of withdrawal, while he may be proceeded against for contempt, and his testimony is open to comment to the jury by reason of his conduct, he is not thereby disqualified, and the weight of authority is that he cannot be excluded on that ground, merely, although the right to exclude under particular circumstances may be supported as within the sound discretion of the trial court.

150 U.S. at 92.

Dealing with the *Holder* issue under contemporary constitutional principles, the Courts of Appeals and the state appellate and supreme courts have recognized that exclusion

of testimony for violation of a sequestration order violates the Sixth Amendment and due process, at least where the testimony was material and the violation of the order was without the knowledge of the defendant or defense counsel. *E.g., United States v. Hobbs,* 31 F.3d 918, 921-23 (9th Cir. 1994); *Braswell v. Wainwright,* 463 F.2d 1148, 1155-57 (5th Cir. 1972); *State v. Jones,* 354 So. 2d 530, 532 (La. 1978); *Dumas v. State,* 350 So. 2d 464, 466 (Fla. 1977); *Commonwealth v. Scott,* 436 A.2d 161, 163 (Pa. 1981).

This case presents the opportunity for the Court to revisit a significant issue last considered in 1893 — and to apply contemporary Sixth Amendment and due process jurisprudence to that issue. In particular, this case also raises the issue of when excluded corroborating testimony is to be deemed "cumulative" rather than "material" — an issue that has broad significance for Sixth Amendment litigation even beyond cases involving sequestration order violations. *See United States v. Valenzuela-Bernal,* 458 U.S. 858, 873 (1982) (violation of due process or the Sixth Amendment requires showing that testimony "would have been material and favorable to [the] defense, in ways not merely cumulative to the testimony of available witnesses.").

B. Exclusion Of A Defense Witness's Testimony At A Criminal Trial For Violation Of A Sequestration Order Contravenes The Sixth Amendment And The Due Process Clause, Where The Barred Testimony Was Material And The Witness's Violation Of The Order Was Unknown To The Defendant And Defense Counsel.

The Court has long held that the right of a criminal defendant to present witnesses at trial is one of the fundamental protections afforded by the Sixth Amendment and due process. In *Washington v. Texas,* 388 U.S. 14, 16-17, 23 (1967), the

Court struck down Texas statutes that prevented co-defendants or co-participants in a crime from testifying for one another. The Court stated that "[t]he right of the accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States," and that the "most basic ingredients of due process of law" include the right "to offer testimony." 388 U.S. at 18. The Court explained:

> Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19.

Subsequent decisions explaining the scope of *Washington*'s holding have set forth that the right is not "absolute" but must be balanced against the "State's interest in the orderly conduct of a criminal trial." *Taylor v. Illinois,* 484 U.S. 400, 411 (1988). The Court has further stated that the right to present witnesses is also subject to the accused defendant's obligation to "comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). Thus, for instance, where evidence was excluded because of "willful misconduct" of defense counsel in failing to identify a witness in response to a pretrial discovery request (*Taylor*, 484 U.S. at 417), the Court upheld an order excluding the witness from testifying at trial as against a Sixth Amendment challenge.

Here, of course, there was no misconduct at trial by Petitioner or defense counsel. The trial judge expressly conceded on the record that the violation of the witness exclusion order was without the knowledge or fault of Petitioner or his trial counsel. He nevertheless barred the witness's testimony, because, in the judge's view, if "they come back [into the courtroom] anyway, *it is charged to the defendant whether it is his fault or not.*" (A10 (emphasis supplied).) This ruling flies in the face of repeated holdings of the Courts of Appeals and state appellate and supreme courts that the Sixth Amendment and due process are violated by barring a witness's testimony for violation of a sequestration order where the violation was not the fault of the defendant or the defendant's attorney.

For instance, in *United States v. Hobbs,* 31 F.3d 918 (9th Cir. 1994), the court reversed a conviction for possession with intent to distribute a controlled substance, holding that the trial court committed "plain error" in barring the testimony of two defense witnesses at a hearing on a motion to suppress evidence. 31 F.3d at 922-23. The witnesses in that case were barred on the ground that they had sat in court during the hearing, in violation of a sequestration order. *Id.* at 920. If permitted to testify, the witnesses would have testified that they did not hear defendant consent to a search of his luggage, thereby casting doubt on police testimony that defendant had consented to the search. *Id.* at 921, 923.

The Ninth Circuit explained that the Sixth Amendment and due process are violated by barring the testimony of a material defense witness unless the defendant or defense counsel bears responsibility for violation of the sequestration order:

> The exclusion of a witness is a strongly disfavored sanction because of the severe consequences it holds for the defendant. In particular, the Supreme Court has long recognized

> that "the right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [fact finder] so it may decide where the truth lies . . . . This right is a fundamental element of due process of law." *Washington v. Texas,* 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). Because of this constitutionally based right of the defendant to present evidence in his favor, disqualification of defense witnesses is too harsh a penalty to impose in the absence of misbehavior by the defendant or his counsel.

31 F.3d at 922.

Likewise, in *Braswell v. Wainwright,* 463 F.2d 1148 (5th Cir. 1972), the Fifth Circuit held that it was improper to exclude a witness for violation of a sequestration order, where the violation was not the fault of defendant or defense counsel. The court explained that exclusion of the witness violated due process and the Sixth Amendment.

> The trial court arbitrarily excluded Rogers [the witness] upon no other basis than that he violated the [sequestration] rule. Such discretion cannot be permitted when it denies a defendant a fundamental constitutional right. Under the particular and extraordinary circumstances of this case the exclusion of Rogers destroyed the fundamental fairness essential to due process in the conduct of a criminal trial.

463 F.2d at 1156.

State supreme and appellate courts have similarly concluded that the exclusion of testimony for violation of a sequestration order violates due process and the Sixth Amendment where the violation was not the fault of defendant or his attorney. *E.g., State v. Jones,* 354 So. 2d 530, 532 (La. 1978) ("Excluding the witness's testimony, in the absence of a sequestration violation with the consent or knowledge of the defendant or his counsel, is not a constitutionally permissible means of insuring reliable testimony."); *Dumas v. State,* 350 So. 2d 464, 466 (Fla. 1977) ("We no more automatically bar the testimony of witnesses who have not been placed 'under the rule' than we prevent a defendant from testifying on his own behalf simply because he has heard all the testimony in his trial before he takes the stand. When confronted with the Sixth Amendment right, then, a mere violation of the rule must give way."); *Commonwealth v. Scott,* 436 A.2d 161, 163 (Pa. 1981) ("To deny an accused the opportunity to present relevant and competent evidence in his defense [for violation of a sequestration order which was not the fault of the accused or his attorney] would constitute a violation of his fundamental constitutional rights to compulsory process for obtaining witnesses in his favor and to a fair trial.").

In short, during the century since *Holder,* the rule there articulated has been refined by the Courts of Appeals and the state supreme and appellate courts to conform to contemporary Sixth Amendment and due process principles. This Court should confirm that exclusion of a witness for violation of a sequestration order violates the Sixth Amendment and due process where the violation was without the knowledge or fault of the defendant or defense counsel.

C. Mr. Harris's Testimony Was Material And Not Cumulative, Because He Was Uniquely Credible As Compared With Petitioner And Derrick Thrasher, And There Is A Reasonable Likelihood That His Testimony Could Have Affected The Judgment Of The Trier Of Fact.

The Illinois Appellate Court affirmed Petitioner's conviction, notwithstanding the exclusion of Mr. Harris's testimony, on the ground that the testimony was purportedly "cumulative" of the testimony of Petitioner and Derrick Thrasher and, accordingly, was not "material." (A6.)

To be sure, the Court has ruled that demonstration of a Sixth Amendment violation requires showing that the omitted testimony "would have been material and favorable to [the] defense, in ways not merely cumulative to the testimony of available witnesses." *United States v. Valenzuela-Bernal,* 458 U.S. 858, 873 (1982). The testimony is material "if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *Id.* at 874.

The flaw of the Illinois Appellate Court's decision is that it incorrectly presumes that testimony that corroborates the testimony of the defendant or another witness is necessarily "cumulative." This Court has expressly rejected that concept. In *Skipper v. South Carolina,* 476 U.S. 1, 8 (1986), the Court held it "implausible" to characterize as "cumulative" or "harmless" the excluded "credible" testimony of prison officials which would have corroborated the "self-serving" testimony of a death row prisoner and his wife.

A correct assessment of whether excluded testimony is cumulative, and not material, logically turns on whether the excluded testimony is somehow uniquely credible as compared with the evidence in the trial record which it corroborates. The

Courts of Appeals have held that the testimony of a corroborating witness is material, even if it simply confirms the defendant's testimony, where the corroborating witness is more credible.

Indeed, *Hobbs* explains that the error of excluding testimony is particularly serious where, as here, the trial court has found the defendant not to be credible. That makes the testimony of the barred witness more essential. Thus, the Ninth Circuit expressly rejected the government's argument that the testimony of two witnesses which would have corroborated the defendant's testimony was "cumulative":

> The disqualification of [the witnesses] implicates Hobbs's constitutional right to present evidence in his favor. In a case such as this where the parties present conflicting, mutually-exclusive stories, the defendant's right to have a witness corroborate his story is even more substantial.

31 F.3d at 923.

The government pointed to the fact that the trial judge had already found the defendant's testimony to be not credible and therefore was not likely to change his decision based on the barred testimony. *Id.* The court explained that the very circumstance that the trial judge had discredited the defendant's testimony made the excluded witnesses' testimony critical:

> [W]e cannot know whether the witnesses' testimony would have affected [that] determination because they were not permitted to testify. Because [the witnesses] would have testified on [the defendant's] behalf, their testimony was critical to persuading the fact finder that [the defendant's] version of the facts was truthful. We therefore

> conclude that the court's original order disqualifying the witnesses constitutes plain error.

Id.

Likewise, in *Braswell,* the Fifth Circuit held that the Sixth Amendment was violated by exclusion of testimony of defendant's "friend" who was "the one person who might have corroborated [defendant's] version of the facts . . . ." 463 F.2d at 1155. It is noteworthy that *Hobbs* and *Braswell* do not regard the corroborating testimony as "cumulative" merely because it supports the defendant's version of the facts. Instead, the corroborating testimony is "material" and not "cumulative," because witnesses who are not on trial for a crime are rightly perceived to be more credible than the defendant.

The materiality of corroborating testimony under such circumstances is confirmed by the opinions of state appellate courts as well. *E.g., People v. Johnson,* 47 Ill. App. 3d 362, 372, 376, 362 N.E.2d 701, 708, 711 (5th Dist. 1977) (reversing conviction where testimony was excluded for violation of a sequestration order, even though excluded testimony would have corroborated the testimony of three other witnesses, because the excluded witness was uniquely credible); *Davis v. State,* 872 S.W.2d 743, 746 (Tex. Crim. App. 1994) (reversing conviction where testimony was excluded for violation of a sequestration order, even though excluded testimony corroborated testimony of another defense witness. "[S]imply because the excluded testimony is not the *only* evidence supporting a defensive theory does not mean that it is not crucial to such defensive theory.").

In the instant case, Mr. Harris's excluded testimony would have corroborated Petitioner's testimony that he did not enter the residence with the police. The only other corroborating testimony was by Derrick Thrasher. But, Derrick Thrasher's

credibility was substantially impaired by his having been charged with a crime arising out of the same incident that was the subject of Petitioner's trial. The trier of fact might well have doubted the veracity of a charged co-participant in the same alleged crimes. William Harris was the *only* corroborating defense witness who had not been charged with a crime. And, it was undisputed that he was a direct eyewitness to the police entry into the Ohio Street home.

Moreover, there is a reasonable likelihood that Mr. Harris's testimony could have affected the judgment of the trier of fact. *Valenzuela-Bernal,* 458 U.S. at 874. If Mr. Harris's testimony had been credited by the trier of fact, it would have entirely undercut the police version of events. As to the heroin allegedly found in the bedroom, William Harris's testimony that Petitioner did not enter the house with the police officers would directly contradict the police testimony that Petitioner ran to the bedroom where the box of heroin was allegedly found. This would undercut any inference that Petitioner was guilty of "possession" of the contraband. The trial court inferred Petitioner's guilt, in part, from a finding that he ran to the room. If that did not happen, the trier of fact might well have resolved the case differently, particularly given the lack of fingerprints or physical evidence linking Petitioner to the box allegedly found in the bedroom.

As to the heroin allegedly delivered to the car, William Harris's testimony would have been important, because it would cast doubt on the credibility of the police officers' rendition of events. The police testimony that they observed Petitioner hand plastic bags to Mr. White is the sole evidence supporting conviction for delivering a controlled substance. If Mr. Harris's testimony were credited, the police version supporting conviction for delivery to the car might well have been rejected.

The Illinois Appellate Court's circumscribed concept of "materiality," which led it to affirm Petitioner's conviction, is contrary to the Sixth Amendment right this Court has recognized to "present the defendant's version of the facts." *Washington v. Texas,* 388 U.S. at 19. Petitioner was entitled to have the trier of fact hear William Harris's testimony.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ERIC A. OESTERLE
Counsel of Record
ALAN M. POSNER
MARY L. MILLS
MONICA A. FENNELL
SONNENSCHEIN NATH
& ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

Counsel for Petitioner

Dated: September 1, 1998

APPENDIX

APPENDIX

TABLE OF CONTENTS

Page

Order of the Appellate Court of Illinois, First Judicial District A1

Trial Court's Judgment and Conviction A7

Excerpt from The Report of Proceedings Before The Trial Court A9

Order of the Illinois Supreme Court Denying Petition for Leave to Appeal A11

FIFTH DIVISION
MARCH 6, 1998

No. 1-96-2137

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 95 CR 17662
v.	)	
BENNIE THRASHER,	)	Honorable John D. Brady,
Defendant-Appellant.	)	Judge Presiding.

ORDER

Following a bench trial, defendant Bennie Thrasher was convicted of possessing a controlled substance (heroin) with the intent to deliver and delivery of a controlled substance (heroin) and was sentenced to eight years in prison. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt. Defendant also contends that the circuit court erred in barring a defense witness' testimony.

At trial, Chicago police officer Derrick Johnson testified that on April 30, 1995, he and two other officers conducted a narcotics surveillance of 5452 West Ohio Street in Chicago. Officer Johnson saw defendant walk out of the building at that address. Defendant walked to a car in which Marcus White

and Derrick Thrasher, defendant's brother, were sitting. Defendant took money from White and gave him three clear plastic bags containing foil packets. As Officer Johnson ran toward defendant, defendant ran into the building at 5452 West Ohio Street. The front door of the building was open, and Officer Johnson chased defendant into an upstairs bedroom. There were two other bedrooms on the second floor. He followed defendant into the room before defendant could close the door. Officer Johnson saw a man on the living room couch as he ran toward the stairs.

Officer Johnson and another officer arrested defendant in the bedroom and advised him of his Miranda rights. When the officers searched defendant, they found $290. They saw a shoe box on the bedroom floor which contained foil packets of heroin. Officer Johnson never saw defendant in physical possession of the heroin. Officer Johnson found an identification card on a dresser which had defendant's photograph and the 5452 Ohio Street address on it. On the dresser, he found several photographs of defendant with other people. In addition, he found three telephone pagers and one or two cellular phones. Defendant told the officers that he worked for himself and that the "weight" was his. Officer Johnson testified that he understood "weight" to refer to the heroin.

Chicago police officer Greg Noncz testified that he was hiding in some bushes when defendant walked out of the building. He saw defendant go to the car and exchange three packets containing silver objects in return for money. Defendant did not count the money that he received. When the driver of the car saw Officer Noncz, he threw the packets out of the car, and Officer Noncz picked them up. The packets contained heroin.

Derrick Thrasher testified that he, Marcus White, and defendant were arrested in a car four or five blocks away from 5452 West Ohio Street. He testified that the police did not find anything in the car, and denied throwing bags of drugs out of the car. After he and White waited 30 minutes at the police

station, the police returned with a shoe box containing heroin. Thrasher denied that he owned the box of heroin. He testified that he and defendant lived at 5452 West Ohio Street at the time of the arrest.

When defendant's counsel attempted to present the testimony of defendant's uncle, William Harris, the circuit court barred his testimony because he was present in the courtroom during trial in violation of the circuit court's order excluding the presence of witnesses. Defendant's counsel made an offer of proof that Harris would have testified that he was on the living room couch when the officers came into the house. He would have testified that the officers used keys to enter the house and searched it without defendant being present. The circuit court acknowledged that Harris' presence in the courtroom in violation of the exclusion order was not defendant's fault or his counsel's fault.

Defendant testified that on April 30, 1995, he, White, and his brother were arrested in a car and brought to a police station. The police officers searched him and took his keys and identification card, but did not find any money. After defendant and the others waited for 30 minutes, the officers returned with a shoe box containing heroin. Defendant denied telling the police that he worked for himself and that the "weight" was his. He also denied telling the police that he was a drug seller or that he lived at 5452 West Ohio Street. According to defendant, he lived at 39 North Central Avenue at the time of the arrest. His brother and uncle lived at 5452 West Ohio Street. Defendant acknowledged that he signed a bond receipt two days after his arrest which listed his address as 5452 West Ohio Street.

On appeal, defendant contends that the State did not prove beyond a reasonable doubt that he had constructive possession of the heroin in the bedroom. When considering the sufficiency of the evidence on appeal, we view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. People v.

Young, 128 Ill. 2d 1, 49, 538 N.E.2d 453 (1989). "To sustain a charge of unlawful possession of a controlled substance, the State must prove knowledge of the possession of the substance, and that the narcotics were in the immediate and exclusive control of defendant." People v. Frieberg, 147 Ill. 2d 326, 360-61, 589 N.E.2d 508 (1992).

> "Knowledge and possession [of a controlled substance] are factual issues, and the trier of fact's findings on these questions will not be disturbed unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of the defendant's guilt." People v. Brown, 277 Ill. App. 3d 989, 998, 661 N.E.2d 533 (1996).

"Constructive possession exists where there is no actual personal present dominion over the narcotics, but there is an intent and a capability to maintain control and dominion over them." People v. Morrison, 178 Ill. App. 3d 76, 90, 532 N.E.2d 1077 (1988). "Constructive possession may be proved if the defendant controlled the premises where the narcotics were found." Morrison, 178 Ill. App. 3d at 90. Proof of control over the premises, however, is not a prerequisite for conviction. People v. Adams, 161 Ill. 2d 333, 344-345, 641 N.E.2d 514 (1994). A defendant's control over the premises where the substance was located gives rise to an inference of knowledge and control of drugs sufficient to sustain a conviction. People v. Brown, 277 Ill. App. 3d at 999.

The State's evidence in the present cause was sufficient to show that defendant lived at 5452 West Ohio Street and had control over the bedroom, one of three in the house. Defendant's brother testified that defendant lived in the house, the police found an identification card with that address and defendant's picture, and the police found pictures of defendant with other people on a dresser in the room. In addition, the bond receipt that defendant acknowledged signing listed 5452 West Ohio Street as his address at the time of the arrest. We therefore find

that a rational trier of fact could have found, beyond a reasonable doubt, that defendant had constructive possession of the heroin. See Luckett, 273 Ill. App. 3d at 1033-34 (defendant had control over an apartment, and therefore constructive possession of narcotics found in the apartment, where evidence from the apartment included an identification card with defendant's photograph and photographs of defendant).

Defendant also contends that the circuit court erred in barring William Harris' testimony when it found that he had been present in court despite its order excluding all witnesses from the courtroom. The circuit court has the discretion whether to bar the testimony of a witness who violated an exclusion order. Skelton v. Chicago Transit Authority, 214 Ill. App. 3d 554, 584, 573 N.E.2d 1315 (1991). However, "an innocent litigant should not be punished by deprivation of testimony material to his case because a witness, without the party's knowledge or fault, has violated the exclusion order of the court." Skelton, 214 Ill. App. 3d at 584-85. We will not disturb the circuit court's exercise of discretion unless the defendant was deprived of material testimony without his fault. People v. Boles, 52 Ill. App. 3d 707, 710, 367 N.E.2d 1031 (1977).

In the present cause, the circuit court found that Harris' presence was not defendant's fault. Defendant, however, was not deprived of material testimony. Defendant's counsel made an offer of proof that Harris would have testified that he was in the house when the officers entered. He also would have testified that the officers used keys to enter the house and searched it without defendant present. Derrick Thrasher's testimony similarly indicated that defendant was not present in the house when the police searched it. Thrasher had testified that he, Marcus White, and defendant were arrested in a car four or five blocks away from 5452 West Ohio Street. He testified that the police did not find anything in the car, and denied throwing bags of drugs out of the car. After he and White waited 30 minutes at the police station, the police returned with a shoe box containing heroin. Thrasher denied that he owned the box of heroin.

Defendant also testified that he, White, and his brother were arrested in a car and brought to a police station. After defendant and the others waited for 30 minutes at the police station, the officers returned with a shoe box containing heroin. Defendant denied telling the police that he lived at 5452 West Ohio Street and testified that he lived at 39 North Central Avenue at the time of the arrest. Defendant was not deprived of material testimony from Harris, whose testimony would have been cumulative of Derrick Thrasher's and his own testimony. See United States v. Perry, 815 F.2d 1100, 1105-06 (7th Cir. 1987).

Accordingly, we affirm the circuit court's judgment. For the foregoing reasons, the judgment of the circuit court is affirmed. Pursuant to People v. Nicholls, 71 Ill. 2d 166, 374 N.E.2d 194 (1978), and relevant statutory provisions 725 ILCS 5/110-7(h) (West 1994); 55 ILCS 5/4-2002.1 (West 1994), we grant the State's motion and incorporate as part of the judgment and mandate a fee of $100 for defending this appeal.

Affirmed.

HARTMAN, J., with HOFFMAN, P.J., and THEIS, J., concurring.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COOK **DEPARTMENT** CRIME
(County) (Municipal) **(Division) (District)**

People of the State of Illinois)
v.) No. 95 CR 17662
Defendant)
Bennie Thrasher)

ORDER OF SENTENCE AND COMMITMENT TO ILLINOIS DEPARTMENT OF CORRECTIONS

The defendant having been adjudged guilty of committing the offenses enumerated below,

IT IS ORDERED that the defendant Bennie Thrasher be and he is hereby sentenced to the Illinois Department of Corrections as follows:

On 5-21-96 Judge Brady sentenced the defendant to 8 years I.D.O.C.
Credit 110 days
Mitt issue

Ill. Rev. Stat.
Offense Delivery Control Substance **Ch.** 720 **Sec.** 401(A) **Par.** (1)(A)

Offense_____ **Ch.**____ **Sec.** _____ **Par.** ____

Offense_____ **Ch.**____ **Sec.** _____ **Par.** ____

Offense_____ **Ch.**____ **Sec.** _____ **Par.** ____

IT IS FURTHER ORDERED that the Clerk of the Court shall deliver a copy of this order to the Sheriff of Cook County.

IT IS FURTHER ORDERED that the Sheriff of Cook County shall take the defendant into custody and deliver him to the Illinois Department of Corrections.

IT IS FURTHER ORDERED that the Illinois Department of Corrections shall take the defendant into custody and confine him in the manner provided by law until the above sentence is fulfilled.

PREPARED BY: S/_____
Deputy Clerk

DATED: 5-21-96 **BRANCH CT.** 502
ENTER: _____ S/ _____
JUDGE **CODE #**

INSTRUCTIONS

CLERK is requested to insert in the appropriate spaces above (1) each sentence and conditions thereof, including the condition that the sentence shall run concurrently or consecutively, as the case may be, with other sentences imposed by the court in this case, or other sentences imposed by courts in other cases; and (2) fill in the following information:

Name and address of counsel for defendant _____

_____

Police Individual Record No. 997183
Illinois Bureau Identification No. _____

CLERK OF THE CIRCUIT COURT OF COOK COUNTY

1. FILE RECORD – COURT CLERK WILL ATTACH TO FILE C 42 A1

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	No. 95-17662
vs.	)	Charge: Delivery of Controlled Substance
BENNIE THRASHER, Defendant.	)	

REPORT OF PROCEEDINGS of the hearing before the Honorable JOHN BRADY, on the 29th day of March, 1996, at 1:30 p.m.

APPEARANCES:

MR. NICHOLAS GRAPSAS & MR. SCOTT HERBERT, 711
Assistant State's Attorneys,
for the People of the State of Illinois.

MR. DENNIS SHERMAN,
for the Defendant.

Christina F. Basis, CSR 084-001769
Official Court Reporter
2650 South California Avenue, Room 4C02
Chicago, Illinois 60608
312-890-6065

* * *

MR. SHERMAN: . . . My offer of proof is this is the defendant's uncle. He will testify that on the date and time in question the officers came to his house, by themselves, not with the defendant, not with any defendants, came in and searched the house using keys that they had which he believes were gotten from Derrick or Bennie Thrasher. That is what he would testify to; that he was the man sleeping in -- that he was the man inside the house when the police officers came. He will testify that the defendant did not run inside the house and was not even present when the police officers came inside and searched the house.

MR. HERBERT: Your Honor, that goes directly to Derrick Thrasher's testimony that they were in the car and that they were waiting at the police station when the police came back and said they searched the home.

THE COURT: You already told him to get out and stay out once.

MR. SHERMAN: I did, judge. I do not know why he came in.

THE COURT: Then it's his fault, and I am going to exclude the testimony.

MR. SHERMAN: Okay. We object to that, judge. It is not the defendant's fault that this first witness came in, and as I said --

THE COURT: Let me put it to you this way. It is reflected upon the defendant because when you admonish your witnesses that you control. As I say at the beginning of the case, then you have to control your witnesses and exclude them. And if you do that and they come back any way, it's charged to the defendant whether it is his fault or not.

I am not saying it's the defendant's fault. I am not saying it's your fault, but it is your witness' fault and he knew that.

* * *

(Excerpt from Report of Proceedings, I 1, I 64 - I 66.)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
85252 SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

June 3, 1998

Mr. Alan M. Posner
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago, IL 60606

No. 85252 - People State of Illinois, respondent, v. Bennie Thrasher, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 25, 1998.